



DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Part 1010

RIN 1506-AB55

No-Action Letter Process

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: FinCEN is issuing this advance notice of proposed rulemaking (ANPRM) to solicit public comment on questions relating to the implementation of a no-action letter process at FinCEN. Given that the addition of a no-action letter process at FinCEN may affect or overlap with other forms of regulatory guidance and relief that FinCEN already offers, including administrative rulings and exceptive or exemptive relief, this ANPRM, among other things, seeks public input on whether a no-action letter process should be implemented and, if so, how the no-action letter process should interact with those other forms of relief.

DATES: Written comments on this ANPRM must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Comments may be submitted by any of the following methods:

- Federal E-rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Refer to Docket Number FINCEN-2022-0007 and RIN 1506-AB55.
- Mail: Financial Crimes Enforcement Network, Enforcement and Compliance Division, P.O. Box 39, Vienna, VA 22183. Refer to Docket Number FINCEN-2022-0007 and RIN 1506-AB55.

FOR FURTHER INFORMATION CONTACT: The FinCEN Regulatory Support Section at 1-800-767-2825 or electronically at <https://www.fincen.gov/contact>.

SUPPLEMENTARY INFORMATION:

I. Scope of ANPRM

This ANPRM seeks comment on the possibility of FinCEN establishing a no-action letter process. Section 6305(a) of the Anti-Money Laundering Act of 2020 (the AML Act)¹ requires the Director of FinCEN, in consultation with the Attorney General, the Federal functional regulators,² State bank supervisors, State credit union supervisors, and other Federal agencies, as appropriate (the “Consulting Parties”), to conduct an assessment of whether to establish a process for FinCEN to issue no-action letters in response to inquiries concerning whether and how anti-money laundering or countering the financing of terrorism laws and regulations apply to specific conduct (the “Assessment”).³ Section 6305(b) of the AML Act requires the Secretary of the Treasury (the “Secretary”), “in coordination with the Director of the Federal Bureau of Investigation, the Attorney General, the Secretary of Homeland Security, and the Federal functional regulators” (the “Coordinating Parties”), to submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report with findings and determinations from the Assessment (the “Report”), as well as to propose rulemakings, if appropriate, to implement the findings and determinations.⁴

On June 28, 2021, FinCEN submitted the Report to Congress. The Report concluded that FinCEN should undertake a rulemaking to establish a no-action letter process to supplement the existing forms of regulatory guidance and relief that third parties may request

¹ The AML Act was enacted as Division F, sections 6001-6511, of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283 (2021).

² Section 6003(3) of the AML Act provides that the term “Federal functional regulator” (A) “has the meaning given the term in section 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6809)” and (B) “includes any Federal regulator that examines a financial institution for compliance with the Bank Secrecy Act.” Under the relevant provision of the Gramm-Leach-Bliley Act, the term “Federal functional regulator” refers to “(A) the Board of Governors of the Federal Reserve System; (B) the Office of the Comptroller of the Currency; (C) the Board of Directors of the Federal Deposit Insurance Corporation; (D) the Director of the Office of Thrift Supervision; (E) the National Credit Union Administration Board; and (F) the Securities and Exchange Commission.” 15 U.S.C. 6809(2).

³ AML Act section 6305(a)(1).

⁴ *Id.* section 6305(b).

from FinCEN.⁵ Consistent with that conclusion, this ANPRM seeks initial public input on the need for a no-action letter process and potential procedures and rules regarding its implementation.

Because the adoption of a no-action letter process may affect existing forms of regulatory guidance and relief offered by FinCEN, this ANPRM also seeks public input on how a no-action letter process should interact with those mechanisms and whether the addition of a no-action letter process is appropriate.

II. Background

A. The Bank Secrecy Act

Enacted in 1970 and amended most recently by the AML Act, the Bank Secrecy Act (BSA) aids in the prevention of money laundering, terrorism financing, and other illicit financial activity.⁶ One stated purpose of the BSA is to “require certain reports or records that are highly useful in—(A) criminal, tax, or regulatory investigations, risk assessments, or proceedings; or (B) intelligence or counterintelligence activities, including analysis, to protect against terrorism.” Another purpose of the BSA is to “establish appropriate frameworks for information sharing” among financial institutions and government authorities.⁷

Congress has authorized the Secretary to administer the BSA. The Secretary has delegated to the Director of FinCEN (the “Director”) the authority to implement, administer, and enforce compliance with the BSA and associated regulations.⁸ FinCEN is authorized to require financial institutions or nonfinancial trades or businesses to maintain procedures to ensure compliance with the BSA and the regulations promulgated thereunder and also to guard

⁵ See FinCEN, *A Report to Congress: Assessment of No-Action Letters in Accordance with Section 6305 of the Anti-Money Laundering Act of 2020* (June 28, 2021), <https://www.fincen.gov/sites/default/files/shared/No-Action%20Letter%20Report%20to%20Congress%20per%20AMLA%20for%20ExecSec%20Clearance%20508.pdf>.

⁶ Section 6003(1) of the AML Act defines the Bank Secrecy Act as comprising Section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b), Chapter 2 of Title I of Public Law 91-508 (12 U.S.C. 1951 *et seq.*), and Subchapter II of Chapter 53 of Title 31 of the United States Code.

⁷ 31 U.S.C. 5311(1), (5).

⁸ Treasury Order 180-01 (Jan. 14, 2020).

against money laundering, the financing of terrorism, and other forms of illicit finance.⁹

B. Compliance and Enforcement Authority

FinCEN has overall authority for evaluating compliance with the BSA, including the coordination and direction of procedures and activities of all other agencies exercising delegated authority.¹⁰ Generally, FinCEN has delegated its authority to examine covered financial institutions for BSA compliance to the appropriate Federal functional regulators.¹¹ In instances in which a covered institution does not have a Federal functional regulator (for example, money services businesses), examination authority is delegated to the IRS.¹² However, FinCEN can and does conduct its own risk-based examinations when appropriate.

FinCEN also has authority to enforce the BSA and its implementing regulations, including the imposition of civil money penalties on financial institutions, nonfinancial trades or businesses, and other persons that violate the BSA.¹³ Generally, the authority to impose such penalties has not been delegated.¹⁴ Certain enforcement authorities have been delegated to the IRS, including the authority to enforce BSA provisions regarding records and reports of foreign financial agency transactions and to investigate criminal violations of certain reporting requirements.¹⁵ Appropriate law enforcement agencies, including the Department of Justice, may also investigate and/or prosecute criminal violations of the BSA.

In addition to the authority that FinCEN has delegated to the regulatory and supervisory agencies under the BSA, some agencies have their own independent authority to examine the institutions they supervise for BSA compliance and to take enforcement actions for

⁹ 31 U.S.C. 5318(a)(2).

¹⁰ 31 CFR 1010.810(a).

¹¹ 31 CFR 1010.810(b).

¹² *Id.*; *Memorandum of Understanding and Delegation of Authority to Examine Nonfinancial Trades and Businesses* (April 21, 2015), available at https://www.irs.gov/irm/part4/irm_04-026-001, Ex. 4.26.1-3.

¹³ 31 U.S.C. 5321.

¹⁴ See 31 CFR 1010.810(d). *But see* 31 CFR 1010.810(g) (regarding the delegation of authority by FinCEN to IRS to assess and collect civil monetary penalties for violations of 31 CFR 1010.350 and 1010.420).

¹⁵ 31 CFR 1010.810(c)(2); 31 CFR 1010(g).

noncompliance. For example, pursuant to 12 U.S.C. 1818(i) and 1786(k), and 31 USC 5321, the Federal banking agencies and FinCEN, respectively, can bring civil money penalty actions for violations of the BSA. Furthermore, some agencies may impose and enforce regulations regarding anti-money laundering or countering the financing of terrorism under their own separate authorities.¹⁶

C. Administrative Rulings, Exceptive or Exemptive Relief, and No-Action Letters

FinCEN currently provides the following forms of regulatory guidance or relief: (1) administrative rulings and (2) exceptive or exemptive relief. An administrative ruling is a written ruling that interprets the relationship between Chapter X of Title 31 of the Code of Federal Regulations (“Chapter X”)—which contains FinCEN’s regulations implementing the BSA—and each situation for which such a ruling has been requested in conformity with specified requirements.¹⁷ Under FinCEN’s regulations, an administrative ruling binds FinCEN if it describes a specifically identified actual situation. In addition, it can have precedential value (meaning it “may be relied upon by others similarly situated”) if FinCEN makes it available to the public through publication on FinCEN’s website or another appropriate forum.¹⁸ However, if FinCEN does not publish the administrative ruling, it may not be relied upon by others similarly situated.

FinCEN may also grant exceptive or exemptive relief—that is, an exception to or exemption from the BSA or the regulatory requirements of Chapter X.¹⁹ These exceptions or exemptions may be conditional or unconditional, may apply to particular persons or classes of persons, and may apply to particular transactions or classes of transactions. But they are applicable only as expressly stated in the order of authorization, and they are revocable in the sole discretion of the Secretary.²⁰

¹⁶ See, e.g., 17 CFR 240.17a-8.

¹⁷ 31 CFR 1010.715.

¹⁸ *Id.* Administrative rulings may be modified or rescinded under appropriate circumstances, which affects the extent to which they are binding and have precedential value. 31 CFR 1010.716.

¹⁹ 31 U.S.C. 5318(a)(7); 31 CFR 1010.970.

²⁰ 31 CFR 1010.970(a).

In contrast with these existing forms of relief, a “no-action letter” as used by other agencies is typically an exercise of enforcement discretion wherein the staff of an agency or the staff of a division of the agency issues a letter indicating its intention not to take or recommend enforcement action against the submitting party for the specific conduct presented in the submitting party’s request.²¹ Generally, such letters address only prospective activity not yet undertaken by the submitting party.

C. The AML Act and the No-Action Letter Report

Section 6305(a) of the AML Act requires the Director, in consultation with the Consulting Parties, to undertake an Assessment of whether FinCEN should establish a process for issuing no-action letters, in response to inquiries concerning the application of the Bank Secrecy Act, the USA PATRIOT Act (Pub. L. 107-56; 115 Stat. 272), section 8(s) of the Federal Deposit Insurance Act (12 U.S.C. 1818(s)), or any other anti-money laundering or countering the financing of terrorism law (including regulations) to specific conduct, including a request for a statement whether FinCEN or any relevant Federal functional regulator intends to take an enforcement action regarding such conduct against the person making the request.²²

Pursuant to the AML Act, the Assessment included an analysis of:

- (A) a timeline for the process used to reach a final determination by FinCEN, in consultation with the relevant Federal functional regulators, in response to a request by a person for a no-action letter;
- (B) whether improvements in current processes are necessary; [and]
- (C) whether a formal no-action letter process would help to mitigate or accentuate illicit

²¹ *Cf.*, e.g., 17 CFR 140.99 (describing a Commodity Futures Trading Commission no-action letter as “a written statement issued by the staff of a Division of the Commission or of the Office of the General Counsel that it will not recommend enforcement action to the Commission for failure to comply with a specific provision of the Act or of a Commission rule, regulation or order if a proposed transaction is completed or a proposed activity is conducted by the Beneficiary,” and also noting that a no-action letter “represents the position only of the Division that issued it, or the Office of the General Counsel if issued thereby,” “binds only the issuing Division or the Office of the General Counsel, as applicable, and not the Commission or other Commission staff,” and may be relied upon by “[o]nly the Beneficiary”); 17 CFR 200.81(a) (describing a Securities and Exchange Commission no-action letter as a “letter or other written communication . . . requesting a statement that, on the basis of the facts stated in such letter or other communication, the staff would not recommend that the Commission take any enforcement action . . .”); 84 FR 48229, 48244 (Sept. 13, 2019) (describing a Consumer Financial Protection Bureau no-action letter as including a statement that “the Bureau will not make supervisory findings or bring a supervisory or enforcement action against the recipient predicated on the recipient’s offering or providing the described aspects of the product or service under (a) its authority to prevent unfair, deceptive, or abusive acts or practices; or (b) any other described statutory or regulatory authority within the Bureau’s jurisdiction”).

²² AML Act section 6305(a)(1).

finance risks in the United States²³

Additionally, FinCEN analyzed the potential impact of no-action letters on other regulators and law enforcement, including specifically considering the possible implementation of a cross-regulator no-action letter process—that is, a process in which a no-action letter is simultaneously sought from multiple regulators regarding the same entity.

Section 6305(b) of the AML Act also requires the Secretary, in coordination with the Coordinating Parties, to submit a Report to Congress presenting findings and determinations from the Assessment and to consider the appropriateness of a proposed rulemaking to implement those findings and determinations.

On June 28, 2021, FinCEN submitted the Report to Congress. FinCEN evaluated, among other things, the challenges associated with the overlap between FinCEN’s enforcement authority and other regulators’ authorities. In light of the existence of parallel and overlapping authorities, FinCEN concluded that, while a cross-regulator no-action letter process might have certain benefits, such a process involving multiple agencies and their respective authorities would present legal and practical challenges. FinCEN also analyzed the potential benefits and concerns regarding how a no-action letter process might impact illicit finance risks. This analysis included potential procedures or requirements to mitigate illicit finance risks.

FinCEN concluded in the Report that it should undertake a rulemaking in order to establish a no-action letter process to supplement the existing forms of regulatory guidance and relief that FinCEN already provides. The primary benefits of a no-action letter process identified in the Report include promoting a robust and productive dialogue with the public, spurring innovation among financial institutions, and enhancing the culture of compliance and transparency in the application and enforcement of the BSA. FinCEN also assessed that the rulemaking process should include consultation with other agencies as needed and appropriate, given the various areas where FinCEN’s no-action letters may affect agencies with parallel or

²³ *Id.* section 6305(a)(2).

delegated authority.

Through this ANPRM, FinCEN seeks public input on whether to establish a no-action letter process, what the scope of and limits on no-action letters should be, and how best to implement the process. FinCEN further seeks comment on how such a process should interact with FinCEN's existing forms of regulatory guidance and relief.

III. Questions for Comment

FinCEN invites comments on all aspects of the implementation of a no-action letter process, as well as the ways in which such a process may interact with FinCEN's existing forms of regulatory guidance and relief. FinCEN also specifically seeks comments on the questions listed below. FinCEN encourages commenters to reference specific question numbers to facilitate FinCEN's review of the comments.

I. No-Action Letters²⁴

Additional Considerations Relating to the Report

- 1) FinCEN evaluated several issues in the Report on no-action letters, including, among other things, the viability of a cross-regulator no-action letter process, a timeline for considering and issuing no-action letters, and the extent to which no-action letters would mitigate or accentuate illicit finance risks. Are there additional considerations not identified in the Report that FinCEN should weigh in evaluating these issues?
- 2) While FinCEN has no legal authority to prevent another agency, including a Federal functional regulator or the Department of Justice, from taking an enforcement action under the laws or regulations that it administers, are there additional points FinCEN should consider in assessing the viability of a cross-regulator no-action letter process? What is the value of establishing a FinCEN no-action letter process if other regulators with jurisdiction over the same entity do not issue a similar no-action letter?

²⁴ Given the pending determination of whether the no-action letters contemplated in this ANPRM will be issued by FinCEN alone, or as cross-regulator letters, or both, the term "no-action letter" in the context of the questions posed in this ANRPM presumes any of these proposed combinations, unless otherwise specified.

- 3) Would a no-action letter process involving only FinCEN be useful? Why or why not?
- 4) Are there additional points FinCEN should consider regarding the timeline proposed in the Report?
- 5) Are there additional points FinCEN should consider concerning the mitigation or accentuation of illicit finance risks beyond those identified in the Report?
- 6) To what extent would an institution be able to rely upon a no-action letter from FinCEN if the institution is subject to oversight and examination for the same or similar matters by another agency?
- 7) What impact would a FinCEN-only no-action letter process or a cross-regulator no-action process have on State, local, or Tribal regulators?
- 8) Do existing laws and regulations permit the issuance of no-action letters, or are any additional rules or changes required to implement such a process? If so, what additional rules or changes would be appropriate?

Contours and Format of a FinCEN No-Action Letter Process

- 9) Should FinCEN establish via regulation any limitations on which factual circumstances would be appropriate for a no-action letter? If yes, what should those limitations be?
- 10) Should FinCEN limit the scope of no-action letters so that such requests may not be submitted during a BSA or BSA-related examination - including when the subject of the request is already a matter under examination, or when it becomes a matter under examination while the no-action letter process is ongoing?
- 11) Would it be valuable for FinCEN provide to information from a no-action letter request to agencies with delegated examination authority under 31 CFR 1010.810 for the purpose of evaluating specific conduct addressed in a no-action letter request, including, among other things, to obtain information that may inform FinCEN's response to the request?
- 12) In its regulation covering administrative rulings, FinCEN requires specific information

to be included in the request for a ruling.²⁵ Should FinCEN require similar elements in no-action letter submissions? If so, which? What is the burden on the requester in gathering this information?

- 13) Are there additional pieces of information not addressed in FinCEN's requirements for administrative rulings²⁶ that FinCEN should, or should not, request to be included in no-action letter submissions?
- 14) In its regulation covering administrative rulings, FinCEN mandates specific procedural and filing requirements for the request.²⁷ Should FinCEN include similar requirements for no-action letter submissions? If so, which? What is the burden on the requester in complying with these potential requirements?
- 15) Are there additional procedural or filing requirements not addressed in FinCEN's requirements for administrative rulings²⁸ that FinCEN should, or should not, require for no-action letter submissions?
- 16) Understanding that typically FinCEN will rely on the facts and circumstances contained in the request, if FinCEN issues a no-action letter to a parent corporation, under what circumstances should the letter apply to some or all subsidiaries, or vice versa? Should the requester specify the entities in the corporate structure to which the no-action letter request applies?
- 17) Should FinCEN limit consideration of no-action letter requests to written materials? For example, should FinCEN require that the content of any oral communication between FinCEN and the requester intended to inform FinCEN's response be submitted in writing to receive official consideration? What is the burden on the requester in complying with this potential requirement?

²⁵ 31 CFR 1010.711(a).

²⁶ *Id.*

²⁷ 31 CFR 1010.711(b)-(d).

²⁸ *Id.*

FinCEN Jurisdiction and No-Action Letters

It is possible that FinCEN may not be able to immediately or definitively establish whether FinCEN has jurisdiction (i.e., regulatory authority) over the entity submitting a no-action letter request. This could be a result of, among other things, facts and circumstances relating to geographic location, the product or service involved, or the business model of the requesting entity.

- 18) Should FinCEN determine that it has jurisdiction prior to the issuance of no-action letters?
- 19) Should FinCEN issue no-action letters where the request is for a ruling on whether FinCEN has jurisdiction over the submitting party? Is this more appropriate for a FinCEN administrative ruling request?
- 20) How should the no-action letter process apply to agents, third parties, domestic affiliates, and foreign affiliates that may be conducting anti-money laundering or BSA functions on behalf of a financial institution either inside or outside the United States?

Changed Circumstances

- 21) Should a change in the overall business organization, such as when two entities merge or one entity acquires another, cause a no-action letter to lose its effect? If so, under what circumstances? If not, how would such a no-action letter continue to apply?
- 22) Should there be any limitations on FinCEN's ability to change the positions reflected in prior no-action letters? If so, under what circumstances?
- 23) What are the potential impacts on the submitting party if, after FinCEN's response, the relevant law or regulation changes?

Revocation

- 24) Should FinCEN publicize standards governing the revocation of no-action letters, or should revocation be determined on a case-by-case basis?
- 25) Under what circumstances should no-action letters be automatically revoked?

(Triggering events could include, for example, changes to law or regulation, provision of false or incomplete information, failure to provide requested additional information, or violation of potential specified procedural requirements.)

26) Should no-action letters have expiration dates? If so, under what circumstances would an expiration date be appropriate?

27) If a no-action letter is revoked, how should FinCEN handle conduct that occurred while the no-action letter was active? In particular, would a rescission result in potential enforcement actions only for conduct after the rescission date, or would an entity also potentially be subject to liability for conduct that occurred while the now-revoked letter was active? Would the answer depend on the basis for the revocation?

28) What other rules should govern the revocation of no-action letters?

No-Action Letter Denials and Withdrawals

29) Should FinCEN create an appeals or reconsideration process for no-action letter denials?

What factors and procedures should this process involve?

30) Should FinCEN publish denials on its website? If so, what level of detail and type of information should be included? For example, should denials be anonymized?

31) Should FinCEN allow submitting entities to withdraw their requests for no-action letters? If so, under what circumstances and at what point in the process should withdrawals be allowed? What should the process be for withdrawing a request for a no-action letter?

Confidentiality

32) Should the no-action letter process be confidential during FinCEN's adjudication of a request?

33) Should FinCEN maintain the confidentiality of no-action letters for a period of time, or indefinitely, after granting them? Under what circumstances should FinCEN maintain confidentiality?

- 34) Should no-action letters be used as published precedents? If so, under what circumstances and conditions should they be precedential? Should no-action letters be applicable beyond the requesting institutions, and under what circumstances and conditions?
- 35) How should FinCEN notify State, local, or Tribal regulators of confidential requests for cross-regulator no-action letters or, if appropriate, confidentially issued cross-regulator no-action letters?
- 36) How should FinCEN notify Federal, State, local, or Tribal regulators of confidential requests for FinCEN-only no-action letters or, if appropriate, confidentially issued FinCEN-only no-action letters?
- 37) If no-action letters and their underlying requests are made public, how should FinCEN handle content that is confidential or sensitive, such as triggering mechanisms for suspicious activity report (SAR) reviews?

Consultation

- 38) What procedures should be put in place for FinCEN to consult with other relevant regulators or law enforcement agencies regarding no-action letter requests?
- 39) How can FinCEN best balance the need to consult other regulators or law enforcement with the desires of submitting parties for confidentiality and expediency?
- 40) Should FinCEN require a submitting party that is seeking a no-action letter to identify all of its regulators? Should FinCEN require that institution to identify all of the regulators of its parent or subsidiary corporations?
- 41) Under what circumstances *other than consultation* should information FinCEN obtains through the no-action letter process be shared with other Federal, State, local, and Tribal agencies, including the U.S. Department of Justice?

Other Questions

- 42) What burdens are requesting institutions expected to face in connection with the implementation of a no-action letter process? Please identify any burdens with specificity, such time spent or salary costs, and estimate the dollar costs of these burdens if possible. How could FinCEN address any such burdens on regulated parties?
- 43) What topics, issues, transaction types, customer types, geographies, products, services, or other matters would be expected to be the subject of no-action letter requests to FinCEN?
- 44) Are there any other comments FinCEN should consider in crafting rules to implement a no-action letter process?

II. The Proposed No-Action Letter and Existing Processes

FinCEN currently provides the following forms of regulatory guidance or relief: (1) administrative rulings and (2) exceptive or exemptive relief, as described in Section II.B above. FinCEN is seeking comment on how the potential no-action letter process may complement existing processes.

- 45) What criteria should distinguish a no-action letter request from an administrative ruling, or from exceptive or exemptive relief?
- 46) What value or benefit does a no-action letter bring that is distinct from an administrative ruling, or from exceptive or exemptive relief?
- 47) Are there improvements that could be made to FinCEN's existing processes for issuing administrative rulings or exceptive or exemptive relief?
- 48) What sort of guidance would be helpful from FinCEN concerning administrative rulings or exceptive or exemptive relief?

IV. Regulatory Planning and Review

This ANPRM is not a significant regulatory action under Executive Order 12866. It has been reviewed by the Office of Management and Budget.

V. Conclusion

With this ANPRM, FinCEN requests input on whether FinCEN should implement a no-action letter process and, if so, how such a process should interact with existing forms of regulatory guidance and relief. FinCEN seeks input from the public on the questions set forth above, including from regulated parties; State, local, and Tribal governments; law enforcement; regulators; and any other interested parties.

By the Department of the Treasury.

Himamauli Das,

Acting Director,

Financial Crimes Enforcement Network.

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